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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77-5708

ELLIS SHELTON,

Petitioner.

vs.

THE STATE OF OHIO,

Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondent respectfully submits that it is opposed to the issuance of a Writ of Certiorari in the within cause for the reason that the Ohio Supreme Court has decided the Federal question at issue in accord with the applicable decisions of this Court concerning the imposition of the death penalty.

Respondent does further oppose certiorari on the second issue based on the fact that (1) there is an adequate remedy at law in Ohio and, (2) the issue has not previously been raised in the State court.

OPINIONS BELOW

The Petition of the petitioners correctly cited the opinions below (Appendix A).

JURISDICTION

The jurisdictional requisites for this Court to proceed on question one is adequately set forth in the petition. However, it is respectfully submitted that the jurisdictional basis of question two is not adequately set forth. Petitioner concedes the fact that this issue was not raised in the lower Courts of Ohio and in fact did not allegedly arise until after the completion of the appellate process in the Ohio Courts. We dispute the jurisdiction of this Court to proceed as to the second issue.

QUESTIONS PRESENTED

I. Does Ohio's statutory scheme for the imposition of the death sentence for aggravated murder violate various provisions of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution?

II. Does the denial by the Supreme Court of Ohio of appointment of counsel for the purposes of pursuing an appeal raising a significant and unresolved federal constitutional question, from the Supreme Court of Ohio to the Supreme Court of the United States for an indigent person under sentence of death constitute an abuse of discretion as to violate the Sixth Amendment to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution, Criminal Rule 11 of the Ohio Rules of Criminal Procedure and Sections 2903.01, 2929.02, 2929.03, 2929.04, 120.06 (4), 120.16 (A) (1), and 120.16 (B) are set forth in Appendix B herein.

STATEMENT OF THE FACTS

On November 5, 1974, the defendant-petitioner Ellis Shelton went to 2248 Wheeler Street which is located two blocks from the Warner Tavern. Connie Bates, the sister of co-defendant Leroy Bates, lived at this address.

On the afternoon of the 25th, the defendant-petitioner Shelton engaged Bates in a conversation while in the presence of Connie Bates. After the conversation had ended at approximately five o'clock in the afternoon Leroy Bates placed a telephone call to Kenneth Carter.

Bates asked Carter if he could borrow a shotgun. Carter replied that he would not lend the shotgun whereupon Bates offered to purchase it. Carter agreed to sell Bates a .12 gauge Stevens single barrel shotgun with a sawed-off barrel (State's Exhibit #11) (TP 135).

Following the telephone conversation, Carter took the shotgun to Wheeler Street in front of Connie Bates' residence. Defendant-Petitioner Shelton emerged from the house and gave Carter thirteen ($13.00) dollars whereupon Carter turned the weapon over to Petitioner Shelton along with three shotgun shells (TP 137). Shelton was to pay the balance of seven ($7.00) dollars at a later time.

Defendant-Petitioner Shelton then returned to the Bates' house while in possession of the weapon (TP 96). At this time Connie Bates overheard another conversation between the petitioner Shelton and her brother Leroy. Petitioner Shelton was discussing an armed robbery which he was planning. Petitioner Shelton stated that he would use a gun in the robbery and that it would be loaded.

He was not satisfied with "penny ante stuff" (TP 97) any longer.

After the conversation between the petitioner and Bates in regards to the proposed armed robbery, Connie Bates retired to her bedroom for the evening (TP 98).

Shortly after midnight on the morning of November 26, 1974, Shelton and Bates entered the Warner Street tavern, located at 303 Warner Street, Cincinnati, Hamilton County, Ohio, wearing stocking masks and armed with the shotgun.

Mrs. Lois Wells, part owner of the cafe, was tending bar. Mr. Robert Schultheis, also part owner of the tavern, was seated at the bar in the rear portion of the cafe. Lloyd Adkins, a Pinkerton security guard, was also seated at the bar drinking, situated in the second seat from the front door (TP 20, 21).

Leroy Bates proceeded to the rear of the tavern where Mr. Schultheis was seated. The petitioner Shelton approached the center portion of the bar. Mrs. Wells asked what the man wanted whereupon petitioner Shelton raised the shotgun over the bar, and pointed it at her. Mrs. Wells responded, "All right, I know what you want." (TP 22).

Bates started to move around behind the bar at which time Lloyd Adkins stated, "Oh, no, you don't." Petitioner Shelton engaged Adkins in a fight. At the same time Bates engaged Mr. Schultheis in a fight. Bates struck Mr. Schultheis and then kicked him into the rear hallway. Petitioner Shelton then knocked Mr. Adkins off balance, stepped back and fired a fatal blast from the shotgun deep into the heart of the defenseless victim (TP 23, 54). Both Bates and the petitioner Shelton then fled the tavern (TP 84).

Connie Bates slept until shortly after midnight when she was awakened by the sound of sirens. Connie then observed the presence of the defendant Shelton and her brother Leroy in her apartment. She overheard a conversation in which Leroy told Petitioner Shelton, "You shouldn't have did it. There probably wasn't a hundred dollars in that place." (TP 99).

Connie also observed blood on the sleeve of the fatigue jacket worn by petitioner Shelton (TP 104). He also had blood on his pants. Connie Bates was sure it was blood because she saw petitioner washing blood from his hands in the bathroom sink (TP 118, 119).

The petitioner also discussed leaving town because of arrest warrants which were outstanding against him (TP 113) but ultimately decided against leaving.

At approximately 1:30 A.M. on November 26, 1974, Kenneth Carter receiver another telephone call from Leroy Bates. Bates asked Carter to "come and get that shotgun", that Ellis had shot a man with it. Carter refused to take the gun (TP 139, 140).

The record reflects that when Bates was unsuccessful in his attempt to convince Carter to reclaim the murder weapon he took the shotgun, wrapped it in a towel and bound it with string from his sister's house. Bates then took the shotgun and towel and drove to a point in the Mt. Airy Forest area just off Kirby Road. Thinking the area to be a dumping ground for garbage, Bates threw the shotgun over the hillside (TP 310, 311). The shotgun was subsequently found.

Doctor Paul N. Jolly, Chief Deputy Coroner, employed by the Hamilton County Coroner's laboratory, testified the cause of Lloyd Adkins death was caused as a result of in-

ternal hemorrhage due to a shotgun wound of the chest. The shotgun muzzle, in Dr. Jolly's expert opinion, was fired from a distance of four or five feet from the victim's body (TP 209-216).

Connie Bates testified that on December 13, 1974, the day after Leroy Bates' arrest, she heard the petitioner Shelton say to her mother, Alma Bates, that he killed the man at the Warner Street tavern (TP 102, 103). Alma Bates and Linda Sue Lawrence also heard the petitioner state, "Yes, I killed the son of a bitch," (TP 284, 299) meaning Lloyd Adkins.

After hearing all the evidence and upon due deliberation the jury returned a verdict of guilty as charged as to both counts of the indictment and as to the specification to the first count.

STATEMENT OF PROCEEDINGS

On January 24, 1975, an indictment was filed by the Hamilton County Grand Jury under case number B-743590. The two count indictment with a specification charged petitioner Ellis Shelton and Leroy Bates with purposely causing the death of Lloyd Adkins while attempting to commit aggravated robbery in violation of Section 2903.-01 of the Revised Code of Ohio.

The second count of said indictment charged Petitioner Ellis Shelton and Leroy Bates with attempted aggravated robbery as defined in Section 2911.01 of the Revised Code of Ohio and in violation of Section 2923.02 of the Revised Code of Ohio.

The specification to the first count of said indictment charged Petitioner Ellis Shelton and Leroy Bates with the offense contained in the first count of the indictment and

that said offense was committed while Petitioner Ellis Shelton and Leroy Bates were attempting to commit aggravated robbery.

Separate trials were held for the co-defendants. The trial of the defendant-petitioner, Ellis Shelton, came on for hearing on April 28th, 1975, in the Court of Common Pleas, Hamilton County, Ohio, before the Honorable William S. Mathews with a jury having been duly impaneled and sworn.

This cause was concluded on May 2nd, 1975, with a finding of guilty as charged on each count and the specification. Subsequent to a psychiatric examination and presentence probation report, a mitigation hearing was conducted. The Petitioner was sentenced to death on October 8th, 1975, after a finding by the trial court that there was an absence of any mitigation factors *present*.

As to the second count of the indictment, the Petitioner was sentenced to the Ohio Penitentiary for a period of not less than 5 nor more than 25 years and costs.

The Court of Appeals for the First Appellate District, Hamilton County, Ohio, affirmed the judgment and sentence in a decision rendered on December 20th, 1976, Case No. C-75584.

The Supreme Court of Ohio affirmed the judgment of the lower Courts in its decision rendered on July 13th, 1977 (Appendix "A").

A timely Petition for Certiorari was filed with this Court.

ARGUMENT

I.

DOES OHIO'S STATUTORY SCHEME FOR THE IMPOSITION OF THE DEATH SENTENCE FOR AGGRAVATED MURDER VIOLATE VARIOUS PROVISIONS OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

A.

The Ohio Capital Punishment Statutes as further elucidated under the Ohio Rules of Criminal Procedure in the determination of mitigating circumstances are constitutional.

We respectfully submit that the Ohio capital sentencing procedure neither encourages nor discourages a defendant into waiving or not waiving his right to a trial by jury. We further submit that at no time from the trial all the way up to the Ohio Supreme Court was this issue ever raised or argued by trial and appellate counsel.

We also find it extremely difficult to comprehend petioner's argument with regard to the procedures for mitigation having an "inevitably . . . chilling effect on the selection of a jury as a mode of trial . . ." where the said petitioner has a jury try his case.

In fact the record for the first twenty-three cases from Hamilton County, Ohio reflects that defendants are choosing juries to determine their guilt or innocence as against choosing a three judge panel almost four to one.[1]

[1] Of the first twenty-three cases that have emanated as aggravated murder with specification charges and gone to trial in Hamilton County, Ohio; eighteen defendants have had their guilt or innocence determined by a jury and only five have waived a jury. Only one defendant plead guilty.

We submit that the facts clearly refute any allegations by the petitioner that the Ohio procedures in any way chills the petitioner's right to a jury trial or to plead guilty to the crime charged in the indictment.

Unlike the statute in *United States* v. *Jackson,* 390 U.S. 570 (1968), the death penalty is possible under the Ohio statute whether the defendant is tried before a jury or a three-judge panel, and it may be avoided under both alternatives.

Petitioner attempts to rest his argument of coercion on a "numbers" game. That is, it is easier to convince one of the three-judge panel that a mitigating circumstance has been proven than it is to convince only one judge. Obviously, this approach overlooks the possibility that the one judge the Petitioner may have to convince is the same judge who would have heard the case with a jury. For the sake of argument, it is submitted that it may be even easier for the Petitioner to convince one of the twelve jurors that he was not guilty or that he was not guilty of an aggravating circumstance. Without unanimity by the jury the result is either a hung jury or a life sentence.

As in any waiver of a constitutional right there are certain considerations which incline toward exercising the right and other considerations which incline toward waiving the right. The balance struck by these competing considerations is for the judgment of the defendant and competent trial counsel.

Mr. Justice Harlan observed in *McGautha* v. *California,*[2] that, "The criminal process, like the rest of the legal system,

[2] *McGautha* v. *California,* 402 U.S. 183 (1971).

is replete with situations requiring 'the making of difficult judgments' as to which course to follow. . . . Although a defendant may have a right even of constitutional dimensions, to follow whichever course he chooses the Constitution does not by that token always forbid requiring him to choose," 402 U.S. at 213. The fact that the Petitioner was faced with a difficult judgment as to which course to follow does not make Ohio's statutory scheme unconstitutional.

We respectfully submit that based upon the above statistics and based upon the above citations; the above procedure neither encourages or discourages a defendant from either trying his case to a jury or a three-judge panel.

B.

The Ohio Capital Punishment Statutes are not violative of the United States Constitution with regard to untrammelled discretion as set forth in Furman v. Georgia.

We find it extremely strange that petitioner with one breath says the Ohio capital punishment scheme is too broad and general and permits untrammelled discretion; whereas with the same breath and in the same brief he argues that the Ohio capital punishment is too narrow and rigid.

We submit that the Ohio capital punishment statutes are neither too broad and general nor too narrow and rigid but rather follow a middle ground course with specific guidelines to ensure the even handed administration of justice and that the death penalty is not carried out in an arbitrary or capricious manner.

Petitioner has reflected that this issue is before this Court in *Bell* v. *The State of Ohio*[3] and further submits that the statute is too broad and general and is not preventative of excess mercy which would affect whether the case is carried forward to the death penalty or not.

This Court specifically addressed this issue in the *Gregg* case[4] when they said at page 199:

> "The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. . . . . NOTHING IN OUR CASES SUGGESTS THAT THE DECISION TO AFFORD AN INDIVIDUAL DEFENDANT MERCY VIOLATES THE CONSTITUTION. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." (Capitalization ours for emphasis)

It is also interesting to note the comment of this Court in its Footnote 50 with regard to the elimination of prosecutorial discretion and plea bargaining and executive clemency, etc. when they said at page 200 of the *Gregg* case that the elimination of "such a system, of course, would be totally alien to our system of criminal justice."

This same general argument was set forth in the case of *Jurek* v. *Texas*[5] in which this Court rejected said argument on the basis of its pronouncements in the *Gregg* case.

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[3] *Willie Bell* v. *The State of Ohio*, October Term, 1977, 76-6513.

[4] *Gregg* v. *Georgia* (1975), 428 U.S. 153.

[5] *Jurek* v. *Texas* (1975), 428 U.S. 262 at page 274.

Ohio has the specific guidelines to prevent the arbitrary and capricious imposition of the death penalty.

In Ohio not every murder brings on the death penalty. It is only certain specific types of cases in which the death penalty may be imposed.[6]

Not only is the death penalty limited to certain specific types of cases but it is also required that the state specifically set forth the aggravated circumstances in the indictment and prove them beyond a reasonable doubt.[7]

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[6] "Ohio Revised Code 2929.04 Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment . . . . and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or certain specific office holders specifically enumerated.

(2) The offense was committed for hire.

(3) The offense was for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing or attempt to kill another committed prior to the offense at bar, or the offense at bar was a part of a course of conduct involving the purposeful killing or attempt to kill two or more persons by the offender.

(6) The victim was a law enforcement officer whom the offender knew to be such and either the victim was engaged in his duties at the time or it was the offenders purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit or fleeing after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery or aggravated burglary."

[7] Ohio Revised Code 2929.04(A).

Therefore the legislature has set forth certain specific definable standards in limiting the type of cases in which this penalty can be imposed. Without going into the question of the mitigating factors at this time, the Ohio statutes are not unconstitutional by enabling the extension of mercy to a defendant by the prosecutor, the court system, or the Governor.

C.

The Ohio Capital Punishment Statutes provide broad general guidelines in the sentencing procedure so as to channel the judges discretion in order to individualize the sentence to the particular defendant and they provide for a meaningful consideration of the character and record of the offender and the nature and consideration of his involvement in the death of another at said mitigation of sentence hearing.

The above statement is a reiteration of the more detailed pronouncements on the question of mitigating factors as reflected in our *Bell* case.[8]

We respectfully submit that the arguments set forth in the *Bell* case with regard to the Ohio mitigating factors are equally applicable to the case currently before this Court. We will therefore endeavor to briefly set forth those arguments which we feel are dispositive of this issue raised by the petitioner.

The death penalty in Ohio can only be inflicted for a person who has caused the death of another and who has

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[8] *Willie Bell* v. *The State of Ohio*, October Term 1976, 76-6525.

been found guilty of one of the specific aggravating specifications beyond a reasonable doubt.

We then come to the question of whether the Ohio death penalty is cruelly inhumane. This Court in *Woodson* v. *North Carolina*, 428 U.S. 280 (1976), in effect stated that a mandatory death penalty without the ability of any type of mitigation procedure and without the ability to temper and individualize the sentence was unconstitutional.

We submit that the Ohio statute is not mandatory nor is it so narrow or rigid as to affront the constitutional guarantees of the Eighth and Fourteenth Amendments to the United States Constitution.

This Court gave its general approval to a bifurcated procedure separating the determination of guilt from the sentencing procedure.[9]

Ohio has such a bifurcated system. In the guilt finding portion of the case the state must show that there was a murder committed in the limited specified types of cases and must prove beyond a reasonable doubt one or more of the specifications.[10]

The Ohio Legislature provided for a situation that meets one of the tests in which this Court determined the Georgia law to be constitutional.

We do not believe there is any question relative to the aggravating specifications of the Ohio statute in specific

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[9] "When human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, A BIFURCATED SYSTEM IS MORE LIKELY TO ENSURE ELIMINATION OF CONSTITUTIONAL DEFICIENCIES IDENTIFIED IN FURMAN." *Gregg* v. *Georgia*, 428 U.S. 169. (Capitalization ours for emphasis)

[10] Ohio Revised Code 2920.03(B).

types of murder cases only passing constitutional scrutiny. In fact, in Georgia, the jury is permitted to consider any aggravating circumstance. This goes well beyond the limitations placed on this type of a crime by the Ohio legislature.

Referring to the Georgia statute which is similar to Ohio's bifurcated trial, this Court held on page 206 of the *Gregg* case (ibid):

> "While the jury is permitted to consider any aggravating or mitigating circumstance, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death.
>
> In this way the jury's discretion is channelled. No longer can a jury wantonly and freakishly impose the death sentence, it is always circumscribed by the Legislative guidelines."

As this Court held in *Proffitt* v. *Florida*, 428 U.S. 242 at page 258:

> "While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authorities' discretion is guided by requiring examination of specific factors that argue in favor of or against the imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition."

We then must turn our attention to the Ohio statutes and the matters to be raised by way of mitigation. In order to insure uniform guidelines and equal evenhanded justice in the administration of those guidelines the state statute sets up certain requirements and guidelines for the mitigation hearing.

First of all, the state requires that the Court obtain a presentence investigation of the defendant with copies of said report being furnished to the prosecutor and either the defendant or his attorneys.[11]

In addition to the presentence report, the statute requires the Court to obtain a psychiatric examination of the defendant with copies of said report being furnished to both the prosecutor and either the defendant or his attorneys.[12]

Thus it can be seen that the defendant does not have to do a thing and the Court is required by law to individualize the sentence for the crime for which the defendant has already been found guilty.

The Court is also required to hear other testimony, if offered. In fact, the statute is so broad as to permit the defendant to orally make a statement or testify without being required to swear to said statement and he is not even subject to cross-examination by the prosecutor.[13]

We then go to the statute specifically spelling out the mitigation process. This statute provides that regardless of the proof of the defendant's guilt beyond a reasonable doubt of the crime and his guilt of one or more of the listed aggravated specifications beyond a reasonable doubt, the death penalty "is precluded when, considering the nature and circumstances of the offense and the history and character, and condition of the offender, one or more of

[11] Ohio Revised Code 2929.03(D).

[12] Ohio Revised Code 2929.03(D).

[13] ". . . if the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation." Ohio Revised Code 2929.03(D).

the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."[14]

As this Court stated in the *Proffitt* case, the requirement that the sentencing authority examine specific mitigating factors that argue against the imposition of the death penalty, eliminates the arbitrariness and capriciousness in the imposition of said penalty.[15]

If we have unbridled, unchallenged discretion in granting mercy, how can the Courts compare one sentence as against another? There must be some uniformity or guidelines. Absent these guidelines, we are right back where we were before *Furman*.[16]

We then look to the guidelines themselves.

The first specific mitigating factor is:

"The victim of the offense induced or facilitated it."

As the Court of Appeals for the Fifth Appellate District

[14] Ohio Revised Code 2929.04(B).

[15] *Proffitt* v. *Florida*, 428 U.S. 242 at p. 258.

[16] *Furman* v. *Georgia*, 408 U.S. 238.

of Ohio in the cases of *State* v. *Hines,* CA 634, and *State* v. *Lucas,* CA 639, in unreported decisions released on February 25, 1977, stated with regard to this first item of mitigation:

> "We note at the outset that the above mitigating circumstance (s) is unlike the second and third in that here the emphasis is on the victim rather than the offender. In short, the 'induce or facilitate' provision provides for mitigating, i.e., lessening the seriousness of the crime because of the conduct of the victim . . . We thus conclude that the legislative intent expressed in R.C. 2929.04 (B) (1) is limited to unlawful conduct on the part of the victim which induces or facilitates the offense."

The Fifth District Court of Appeals then quoted from *State* v. *Woods,* 48 O.S. (2d) 127 at page 137, in which that Court stated:

> "This definition appropriately allows consideration of the broad range of information relevant to mitigation set out in R.C. 2929.04, including 'the nature and circumstances of the offense and the history, character, and condition of the offender.' It also corresponds, as well perhaps as any definition, to the essential purpose of any hearing upon mitigation. The question at that stage is not guilt, for guilt has already been determined. Nor is it primarily whether the standards of conduct imposed by the criminal law have been upheld in order to express society's disapproval of the criminal act and to deter others, for those goals too are largely accomplished by the verdict. Rather the purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration of the individual offender and his crime. As the United States Supreme Court has said: '* * * The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions * * *' *Williams* v. *New York* (1949), 337 U.S. 241, 247.
>
> Construing R.C. 2929.04 (B) liberally in favor of the accused, we think that the standard stated is appropriate for the trial judge or judges to apply to the facts presented at the mitigation hearing including the nature and circumstances of the offense and the history, character and condition of the defendant, in making the determination of whether a sentence of death should be reduced to life imprisonment because of duress or coercion . . .' (The 5th District Court of Appeals underlined those above portions for emphasis)."

They then stated in their opinions:

> "We construe this language to mean that the issue of whether the mitigating condition has been established by a preponderance of the evidence must not be considered in a vacuum but rather shall be weighed in conjunction with the nature and circumstances of the offense as well as the history, character, and condition of the defendant."

In the case currently before this Court we have the Triggerman Petitioner who obtained the gun before the robbery and loaded up the gun. We have him going into the premises in which the robbery murder occurred. We have him engaging in a fight with the decedent victim and knocking him on the ground and then stepping back and firing the shotgun into the victim at short range. If the petitioner was unable to defend the case on the allegation

of self defense; he clearly had the opportunity of raising this issue under this mitigating circumstance. As will be reflected by the Ohio Supreme Court's determination in our presentation on the second mitigating factor, the Supreme Court reflects that the terms in the mitigating section are to be construed more liberally for the accused than in applying the strict legal standard.[17]

The second mitigating factor is:

> "It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation."[18]

We believe that we can have no better determination of the second mitigating factor than to quote the Ohio Supreme Court in the case of *State* v. *Woods,* 48 O.S. 2d 127 at pages 134, 135, 136 and 137 in which that Court held:

> "The question is whether this evidence was sufficient to justify mitigation of sentence. R.C. 2929.04 (B) provides that the death penalty: . . . . is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance (sic) of the evidence:
>
> . . . .
>
> 2. It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> THIS LANGUAGE MUST BE STRICTLY CONSTRUED AGAINST THE STATE AND LIBERALLY CONSTRUED IN FAVOR OF THE ACCUSED. R.C. 2901.04 (A).

[17] *State* v. *Woods* (1976), 48 O.S.(2d) 127.

[18] Ohio Revised Code 2929.04(B)(2).

In construing and applying the words 'duress' and coercion,' WE MUST NOTE FIRST THAT THOSE TERMS WOULD BE A VIRTUAL NULLITY IF THEY WERE TAKEN TO APPLY TO THE LEGAL STANDARD FOR DURESS AS A DEFENSE TO A CRIMINAL charge.

In the case of the most common type of aggravated murder, purposely causing death in connection with certain felonies, if the defendant has a valid defense of duress to the underlying crime, he can, at most, be convicted of the murder itself, not of aggravated murder, and he would not then be subject to the death penalty. Accordingly, TO HAVE ANY EFFECTIVE MEANING, THE TERMS 'DURESS' AND 'COERCION' IN R.C. 2929.04 (B) MUST BE CONSTRUED, IF POSSIBLE, MORE BROADLY THAN WHEN USED AS A DEFENSE IN CRIMINAL CASES. This is particularly true since the defendant is required to establish duress or coercion by a preponderance of the evidence for purposes of mitigation, whereas during trial, he is required only to present evidence sufficient to raise such an affirmative defense, and the burden of disproving it beyond a reasonable doubt remains with the prosecution. *State* v. *Robinson* (1976), 47 Ohio St. 2d 103, 351 N.E. 2d 88.

THE CONCEPTS OF DURESS AND COERCION ARE ALSO FOUND IN CIVIL LAW AND HAVE BROADER MEANING. THE APPLICATION OF THOSE CONCEPTS VARIES GREATLY, AND TURNS LARGELY UPON THE CIRCUMSTANCES OF EACH INDIVIDUAL CASE, INCLUDING THE CHARACTER OF THE ONE SOUGHT TO BE INFLUENCED. As this court held in *Tallmadge* v. *Robinson* (1952), 138 Ohio St. 333, 109 N.E. 2d 496, paragraph two of the syllabus:

> 'In determining whether a course of conduct results in duress, the question is not what effect such conduct would have upon an ordinary man

but rather THE EFFECT UPON THE PARTICULAR PERSON TOWARD WHOM SUCH CONDUCT IS DIRECTED, AND IN DETERMINING SUCH EFFECT THE AGE, SEX, HEALTH AND MENTAL CONDITION OF THE PERSON AFFECTED, THE RELATIONSHIP OF THE PARTIES AND ALL THE SURROUNDING CIRCUMSTANCES MAY BE CONSIDERED.'"

(Capitalization ours for emphasis)

The Ohio Supreme Court then went on to specifically spell out the definitions of the words duress and coercion. They then went on to say:

"THIS DEFINITION APPROPRIATELY ALLOWS CONSIDERATION OF THE BROAD RANGE OF INFORMATION RELEVANT TO MITIGATION SET OUT IN R.C. 2929.04, INCLUDING 'THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AND THE HISTORY, CHARACTER, AND CONDITION OF THE OFFENDER.' It also corresponds, as well perhaps as any definition, to the essential purpose of any hearing upon mitigation. The question at that stage is not guilt, for guilt has already been determined. Nor is it primarily whether the standards of conduct imposed by the criminal law have been upheld in order to express society's disapproval of the criminal act and to deter others, for those goals too are largely accomplished by the verdict. RATHER, THE PURPOSE OF MITIGATION IS TO RECOGNIZE THAT THE PUNISHMENT ASSIGNED FOR A CRIMINAL ACT MAY, FOR ETHICAL AND HUMANITARIAN REASONS, BE TEMPERED OUT OF CONSIDERATION OF THE INDIVIDUAL OFFENDER AND HIS CRIME. As the United States Supreme Court has said:

'• • • The belief no longer prevails that every

offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions • • •.' *Williams* v. *New York* (1949), 337 U.S. 241, 247.

CONSTRUING R.C. 2929.04 (B) LIBERALLY IN FAVOR OF THE ACCUSED, WE THINK THAT THE STANDARD STATED IS APPROPRIATE FOR THE TRIAL JUDGE OR JUDGES TO APPLY TO THE FACTS PRESENTED AT THE MITIGATION HEARING, INCLUDING THE NATURE AND CIRCUMSTANCES OF THE OFFENSE, AND THE HISTORY, CHARACTER AND CONDITION OF THE DEFENDANT, IN MAKING THE DETERMINATION OF WHETHER A SENTENCE OF DEATH SHOULD BE REDUCED TO LIFE IMPRISONMENT BECAUSE OF DURESS OR COERCION." (Capitalization ours for emphasis)

Thus it can readily be seen that the Ohio Supreme Court has substantially broadened the definition of coercion and duress and each is individualized to the nature and circumstances of the case, the history, character and condition of the defendant.

The Supreme Court has also directed that the language in the mitigation statute must be strictly construed against the state and liberally construed in favor of the accused.

Thus we have a guidline which is broadly construed against the state and in favor of the defendant and which is tempered to the individual defendant on an individualized basis.

Although there is no claim of duress or coercion we

can clearly see how the Ohio Court has broadened the scope and consideration of the mitigating factors so as to consider the individualized history and background of the petitioner as it relates to the entire case.

The manner in which the Ohio Supreme Court has interpreted the question of duress and coercion are equally applicable in the interpretation of the alleged claim of self-defense.

The third mitigating factor to be considered by the trial judge in the mitigation hearings is:

> "The offense was primarily the product of the offender's psychosis or mental deficiency though such condition is insufficient to establish the defense of insanity."

Although the petitioner does not argue that the offense was primarily the product of the offender's psychosis or mental deficiency we are submitting a short statement on this mitigating facor to reflect its interpretation by the Ohio Courts.

The Supreme Court of Ohio in the case of *State* v. *Bayless*, 48 O.S. (2d) 73 at page 96, defined the term mental deficiency as that term is used in the mitigation process. They held that:

> "Mental deficiency is consistently defined to mean a low or defective state of intelligence, construing the term broadly, a deficiency may be severe or mild and may be hereditary or caused by a brain defect, disease, or injury, or by whatever other conditions might cause subnormal intelligence."

The Supreme Court of Ohio then in the case of *State* v. *Black*, 48 O.S. (2d) 262 (1976), at page 268, went on

to broaden the definition of this section of the code and stated:

> "(3) The offense was primarily the product of the offender's *psychosis* or *mental deficiency*, though such condition is insufficient to establish the defense of insanity. (Emphasis added.)
>
> It is clear that the General Assembly chose the emphasized language to allow the trial judge or panel the broadest possible latitude in the examination of the defendant's mental state and mental capacity for the purpose of the mitigation inquiry, excepting only legal insanity, the existence of which would have absolved the defendant from criminal responsibility for his crime. Thus, BROADLY DEFINED AND HOWEVER EVIDENCED, ANY MENTAL STATE OR INCAPACITY MAY BE CONSIDERED IN LIGHT OF ALL THE CIRCUMSTANCES AND INCLUDING THE NATURE OF THE CRIME ITSELF SO THAT IT MAY BE DETERMINED WHETHER THE CONDITION FOUND TO HAVE EXISTED WAS THE PRIMARY PRODUCING CAUSE OF THE OFFENSE. To define terms such as those used in the statute is to narrow them."
>
> (Capitalization ours for emphasis)

It is also to be noted that the opening statement of Ohio Revised Code Section 2929.04 (B) specifically provides:

> ". . . the death penalty is precluded. When, considering the nature and circumstances of the offense and the HISTORY, CHARACTER, AND CONDITION of the offender . . ."
>
> (Capitalization ours for emphasis)

It is to be noted that the Ohio bifurcated system required the showing of the intentional murder while in-

tentionally committing one of the aggravated specifications beyond a reasonable doubt prior to the mitigating section of the code even coming into play.

We respectfully submit that the Ohio mitigating circumstances clearly provided for a meaningful consideration on an individualized basis of any mitigating factors that were available to the petitioner.

The Ohio mitigating statute clearly falls within the guidelines of those approved in the *Gregg*[19], *Proffitt*[20], and *Jurek*[21] cases by this Court.

D.

The Ohio statutory system for the imposition of capital punishment is not unconstitutional because it requires a different degree of proof as to the basic crime and guilt of the defendant as against the mitigating factors.

We find it somewhat difficult to fully comprehend what the petitioner seeks in this section of his brief. Is it his desire that the mitigating factors must be proved by the same quantum of evidence (beyond a reasonable doubt) that the basic crime is proven by? We think not although that is what his argument appears to say.

As previously reflected; Ohio has a bifurcated system in capital punishment cases in which the intentional killing

[19] *Gregg* v. *Georgia* (1976), 428 U.S. 153.

[20] *Proffitt* v. *Florida* (1976), 428 U.S. 242.

[21] *Jurek* v. *Texas* (1976), 428 U.S. 262.

in certain limited types of murder cases and the commission of one of the aggravating specifications must be proven beyond a reasonable doubt. It is to be noted that under the Ohio system; before the defendant even has a mitigation hearing, he has already been found guilty of one of the specific types of murder and the aggravating specification beyond a reasonable doubt.

The defendant is not required to do anything at this point. The statute mandates that the trial judge order a presentence investigation and orders the Court to order a psychiatric examination of the defendant. Based on these post-trial reports the Court makes its determination as to whether mitigating factors exist. As can be seen, the defendant does not have to do anything. However, if he does nothing, he bears the risk of non persuasion. In Ohio the defendant is given the opportunity of presenting any relevant evidence including his own oral statements not subject to oath or cross-examination.

Petitioner seems to be suggesting that the State be required to prove the negative or the non-existence of mitigating circumstances beyond a reasonable doubt.

We submit that the Ohio procedure and the matter with regard to the burden is no different than the Florida statute already approved by this Court. As this Court held in *Proffitt* v. *Florida* (ibid) at pages 248 and 249, with regard to the Florida mitigation hearing:

> "Evidence may be presented on any matter the judge deems relevant to sentencing and must include matters relating to certain *legislative* specified aggravating and mitigating circumstances. Both the prosecution AND THE DEFENSE may present argument on whether the death penalty shall be imposed.
>
> At the conclusion of the hearing the jury is directed

> to consider 'WHETHER SUFFICIENT MITIGATING CIRCUMSTANCES EXIST . . . WHICH OUTWEIGH THE AGGRAVATING CIRCUMSTANCES FOUND TO EXIST;' . . . . The jury's verdict is determined by a majority vote. It is only advisory."
>
> (Capitalization ours for emphasis.)

The basic difference in proof as reflected by the Ohio and Florida statutes is that by the time of the mitigation hearing the aggravating specification has already been proven beyond a reasonable doubt. However, it is to be noted, Florida requires the jury to determine that sufficient mitigating circumstances exist which outweigh the aggravating circumstances. We can see little or no difference between saying it in this manner or saying it in the manner pronounced in the Ohio mitigation statute.

As the Ohio Supreme Court stated in the case of *State* v. *Robinson*, 47 O.S. (2d) 103 (1976) at page 107 and reaffirmed in *State* v. *Downs*, 51 O.S. (2d) 47 (1977) at page 55:

> "The other sense of 'burden of proof' is the burden of persuasion. This refers to the risk which is borne by a party if the jury finds that the evidence is in equilibrium. The party with the burden will lose if he fails to persuade the trier of fact that the alleged fact is true by such quantum of the evidence as the law demands."

How is this different from the Florida statute which requires the mitigating circumstances to outweigh the aggravating circumstances. If the defendant in Florida shows no mitigating circumstances and if the aggravating circumstances are shown he could lose by virtue of his non participation or non persuasion.

As the Ohio Supreme Court went on to state in the *Downs* case (ibid) at page 55:

> "In a mitigation hearing the defendant does not bear the burden of initial production. Regardless of the defendant's participation or lack thereof in the mitigation hearing, the court has the initial responsibility to require that certain evidence be collected and certain examinations be made. From a careful consideration of those reports and of the evidence presented during the course of the trial, the judge, or panel of judges, decides whether mitigation is established by a preponderance of the evidence. If the trial court may nonetheless find in his favor. If he chooses to present evidence, the court must consider any such testimony or documentary proof relevant to the sentencing decision. If the defendant makes a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation. R.C. 2929.03 (D).
>
> As to the burden of persuasion, it is apparent from the statute that if the evidence is in equilibrium, the risk of non-persuasion falls upon the defendant."

All the elements of the crime including the aggravating specification have been proven beyond a reasonable doubt prior to the mitigation hearing. As this Court held in the case of *Patterson* v. *New York*, 97 S. Ct. 2319 (1977) at page 2327:

> "We thus decline to adopt as a constitutional imperative . . . that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused. . . . . We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements including the definition of the offense which the defendant is charged. Proof of

the nonexistence of all affirmative defenses has never been constitutionally required, and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here."

Ohio's statute being similar to the Florida statute approved in the *Proffitt* case, we respectfully submit that this allegation of alleged violation of a constitutional right of the petitioner is without merit.

II.

DOES THE DENIAL OF THE SUPREME COURT OF OHIO FOR AN APPOINTMENT OF COUNSEL FOR THE PURPOSES OF PURSUING AN APPEAL RAISING A SIGNIFICANT AND UNRESOLVED FEDERAL CONSTITUTIONAL QUESTION, FROM THE SUPREME COURT OF OHIO TO THE SUPREME COURT OF THE UNITED STATES FOR AN INDIGENT PERSON UNDER SENTENCE OF DEATH CONSTITUTE AN ABUSE OF DISCRETION AS TO VIOLATE THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

The petitioner in this case was appointed legal counsel who represented the petitioner at the time of his trial and throughout all of the matters on direct appeal through the Ohio Court of Appeals and the Ohio Supreme Court. Thus the petitioner has had appellate counsel throughout his entire proceedings on appellate review.

We feel that a little background in this matter might be appropriate in light of what appears to be a clear dropping of the petitioner Ellis Shelton by defense counsel after the Ohio Supreme Court decided the case on the merits.

It is to be noted that it was appointed defense counsel who prepared the stay of execution and who prepared the Notice of Appeal. It is also to be noted that it was appointed counsel who had the Notice of Appeal to the United States Supreme Court signed by the petitioner and filed with the Ohio Supreme Court (See Appendix "C"). In addition to the above, Court appointed counsel made arrangements with the American Civil Liberties Union of Ohio Foundation, Inc. to represent the petitioner before this Court (See Appendix "D"). In accordance with that request the American Civil Liberties Union obtained legal counsel for the petitioner to file his petition for a Writ of Certiorari to this Court (See Appendix "E"). Thus we do not have the situation which might be implied from a reading of the petitioner's brief that he was literally left high and dry by his appointed counsel after the direct appeal had been concluded. The petitioner had legal counsel throughout the proceedings including the current volunteer counsel who has volunteered to represent the petitioner in his Petition for a Writ of Certiorari to this Court.

In addition; we submit that there is a new body of law in the State of Ohio creating a public defender system in this state. This series of laws forming the state public defender system became effective on January 13th, 1976. Ohio Revised Code Section 120.06 (A) (4) provides that the State Public Defender "shall provide representation to any person incarcerated in any penal institution of the

state, in any matter which the person asserts he is unlawfully imprisoned or detained." Ohio Revised Code Section 120.16 (A) (1) provides that "The county public defender shall provide legal representation to indigent persons charged with the violation of a state statute that is a serious offense as defined by the Rules of Criminal Procedure . . ." Ohio Revised Code Section 120.16 (B) provides:

> "The county public defender SHALL PROVIDE LEGAL REPRESENTATION authorized by division (A) of this section at every stage of the proceeding following arrest, detention, service of summons or indictment."

There is no indication that the petitioner ever sought the assistance of the state public defender or the county public defender to assist him in the preparation and presentation of his Petition for a Writ of Certiorari.

If the above were not enough, we then look to the pronouncement of this Court in the case of *Ross et al.* v. *Moffatt* (1974) as reported in 417 U.S. 600, 41 L. Ed (2d) 341, and 94 S. Ct. 2437, in which this court stated on page 346 of the Law Edition Citation:

> "The Fourteenth Amendment does not require North Carolina to provide counsel for a convicted indigent defendant seeking to file a Petition for Certiorari in this court, under circumstances where the State will have provided counsel for his only appeal as of right, and the brief prepared by such counsel together with one and perhaps two State appellate opinions will be available to this Court in order to decide whether to grant certiorari."

We therefore believe that it is inconceivable to believe that the Ohio Supreme Court's failure to act on the application to appoint legal counsel constituted such an abuse of

discretion as to be violative of the Sixth Amendment to the United States Constitution where:

(1) Appointed counsel prepared and filed all necessary papers in the Supreme Court of Ohio to protect the petitioner's rights to seek certiorari in this Court; and,

(2) Appointed counsel obtained with the assistance of the American Civil Liberties Union of Ohio Foundation, Inc. an attorney to volunteer to file a Petition for Certiorari to this Court; and,

(3) Appointed counsel does not withdraw until a volunteer has been obtained; and,

(4) No indication is reflected anywhere in the record or by briefs that the assistance of the county public defender was sought; and,

(5) Where all avenues of direct appeal in the State Courts had been concluded and briefs written and opinions given.

We therefore submit that this issue of petitioner is without merit.

CONCLUSION

In conclusion we respectfully submit that there are no unresolved Federal questions involved in light of the fact that:

(1) The death penalty in and of itself is not unconstitutional as a punishment for certain limited crimes and under certain circumstances.

(2) The Ohio capital punishment statutes provide for

the death penalty with regards to certain limited murder offenses with specific aggravating specifications followed by a separate mitigation hearing which individualizes the punishment to the individual defendant taking into consideration amongst other things the nature and circumstances of the offense, the character of the defendant, his mental status, whether the victim induced the killing, etc.

(3) The petitioner who was the triggerman in the murder of the decedent has failed to reflect how the Ohio mitigating statute did not individualize the punishment imposed on him.

(4) The petitioner has had counsel throughout the entire proceedings up to the present date.

We therefore respectfully request that this Court deny Certiorari in this case.

Respectfully submitted,

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APPENDIX "A"

THE STATE OF OHIO, APPELLEE, *v.* SHELTON, APPELLANT.

[Cite as State v. Shelton (1977), 51 Ohio St. 2d 68.]

Criminal law—Aggravated murder—Conspiracy—Evidence—Declaration of conspirator—Admissibility against co-conspirator.

1. A conspiracy to commit a crime does not necessarily end with the commission of the crime.

2. A declaration of a conspirator, made subsequent to the actual commission of the crime, may be admissible against any co-conspirator if it was made while the conspirators were still concerned with the concealment of their criminal conduct or their identity. (*State* v. *DeRighter*, 145 Ohio St. 552, approved and followed.)

(No. 77-127—Decided July 13, 1977.)

APPEAL from the Court of Appeals for Hamilton County.

On January 24, 1975, the Hamilton County grand jury returned a two-count indictment, with a specification. The first count charged Leroy Bates and the defendant, Ellis Shelton, with purposely causing the death of Lloyd Adkins while attempting to commit aggravated robbery in violation of R. C. 2903.01.

The specification to the first count stated that the offense contained in the first count was committed while Bates and Shelton were attempting to commit aggravated robbery.

The second count charged the pair with attempted aggravated robbery, as defined by R. C. 2911.01 and in violation of R. C. 2923.02.

In a separate trial, Shelton was found guilty on each count and the specification. Following a psychiatric examination and a presentence probation report, a mitigation hearing was conducted. The court found an absence of any mitigating factors, and on October 8, 1975, Shelton was sentenced to death on the first count and the specification thereto. On the second count, he received a sentence for a term of years.

The Court of Appeals affirmed the conviction and sentence.

The cause is now before this court upon an appeal as of right.

Mr. Simon L. Leis, Jr., prosecuting attorney, *Mr. Thomas P. Longano* and *Mr. Robert R. Hastings, Jr.*, for appellee.

Mr. Donald L. Weber and *Mr. Daniel Reif*, for appellant.

O'Neill, C. J. On November 25, 1974, the defendant and Bates apparently agreed to rob the Warner Tavern in Cincinnati, Ohio. After deciding that a gun was necessary, Shelton purchased a .12 gauge J. Stevens single barrel shotgun from Kenneth Carter. Shortly after midnight on the morning of November 26, the defendant and Bates entered the Warner Tavern. Both men were wearing stocking masks. Shelton was armed with the shotgun.

Mrs. Lois J. Wells was tending bar and talking to Robert Schultheis who was seated at the bar in the rear part of the barroom. Lloyd Adkins, an off-duty Pinkerton guard, was seated at the bar near the front entrance. Adkins and Schultheis were approximately 18 feet apart.

Leroy Bates proceeded to the rear of the tavern where Schultheis was seated. The defendant approached the center portion of the bar. Mrs. Wells asked the man what he wanted, whereupon Shelton raised the shotgun over the bar and pointed it at her. Mrs. Wells responded, "All right, I know what you want."

When Bates started to move around to Mrs. Wells' side of the bar it was her intention to let him take the money. As Mrs. Wells moved to the rear of the bar, she heard Adkins say to Shelton, "Oh, no you don't." She then turned and looked toward the front of the tavern where Shelton and Adkins were struggling. Shelton knocked Adkins off balance, stepped back, and fired a fatal shot. Both Bates and Shelton then fled the tavern.

At approximately 1:30 A.M. on November 26, 1974, Kenneth Carter received a telephone call from Leroy Bates. Bates asked Carter to "Come and get that shotgun," and said that Shelton had shot a man with it. Carter refused to take the gun.

The record reflects that when Bates was unsuccessful in his attempt to convince Carter to reclaim the murder weapon, he wrapped the shotgun in a towel and attempted to dispose of it in an area near Mt. Airy Forest. The gun and towel were later found.

Both Bates and Shelton were arrested soon after the killing. During the trial of the defendant, the state presented an overwhelming amount of evidence pointing to the defendant's involvement in the commission of the aggravated robbery and murder.

I.

Appellant advances three propositions of law; the first two are summarized as follows:

1. The trial court substantially erred to the prejudice of appellant in denying his motion to dismiss for the reason that the provisions of R. C. 2903.01, 2929.02, 2929.03 and 2929.04 unconstitutionally permit arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

2. The trial court substantially erred to the prejudice of appellant in denying his motion to dismiss for the reason that the death penalty imposed by R. C. 2929.04 constitutes cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution.

These propositions of law were rejected by this court in *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, 357 N. E. 2d 1035. See, also, *State* v. *Black* (1976), 48 Ohio St. 2d 262, 358 N. E. 2d 551, and *State* v. *Downs* (1977), 51 Ohio St. 2d 47.

II.

Appellant's third proposition of law states:

The trial court erred in allowing in evidence, over defendant's timely objection, testimony by a state's witness regarding an alleged telephone conversation between the witness and a co-conspirator, which testimony constituted an extra-judicial declaration of the co-conspirator, made in the absence of the defendant, out of the defendant's presence, without the defendant's knowledge, after the termination of the conspiracy and which tended to prove the guilt of the defendant.

After the shooting, the defendant and Leroy Bates fled from the Warner Tavern. They ran through the Fairview School yard and then back to Connie Bates' apartment on Wheeler Street. Connie Bates saw the defendant in her

bathroom washing blood from his hands. He also had blood on his fatigue jacket and on his pants.

At approximately 1:30 A.M., Carter received a telephone call from Leroy Bates. In recalling the conversation during the trial, Carter's testimony proceeded as follows:

> "Q. Later on that evening did anything happen to bring your attention back to this particular gun?
>
> "A. About 1:30 or something, I received a call from Leroy Bates; and he told me, 'Come and get the shotgun.'
>
> "Mr. Weber: Objection as to any conversation.
>
> "The Court: Overruled.
>
> "Q. What did he say to you on the phone call?
>
> "A. He told me 'Come and get the shotgun,' that Ellis had shot a man with it.
>
> "Q. What did you say to him?
>
> "A. I told him to keep the gun, I didn't want it."

Appellant claims the court's ruling as error. As a general rule, he contends, the incriminating, inculpatory, extrajudicial declarations of a conspirator, after termination of the common purpose and in the absence of or without the knowledge of his fellow conspirators, do not bind the nondeclarants and such statements are inadmissible to prove the participation of co-conspirators in the crime charged. Applying this rule to the case at bar, appellant continues, Carter's testimony was inadmissible. Appellant argues that at the time of the alleged telephone conversation, the conspiracy to rob had terminated and the conspiracy was, therefore, at an end; and that the alleged conversation took place out of the presence of the defendant, and was sufficiently remote in time from the commission of the criminal act charged as to not be appropriately considered as part of the *res gestae*. Consequently, appel-

lant contends the admission of such testimony requires that his conviction be reversed.

Subject to certain exceptions, this court finds little complaint with the appellant's abstract principle of law. In *Patton* v. *State* (1856), 6 Ohio St. 468, this court stated in paragraph one of the syllabus:

> "The acts and declarations of a conspirator may, after sufficient proof of conspiracy, be given in evidence to charge his fellow-conspirator, but subject always to the *limitation* that the acts and declarations admitted be those only which were made and done during the pendency of the criminal enterprise, and in furtherance of the common object." Accord *Rufer* v. *State* (1874), 25 Ohio St. 464; *Kent* v. *State* (1884), 42 Ohio St. 426; *Neighbours* v. *State* (1930), 121 Ohio St. 525, 169 N. E. 839. See, also, 4 A. L. R. 3d 671.

However, it is well recognized that the conspiracy does not necessarily end with the commission of the target crime. Thus, a subsequent declaration of a conspirator may be admissible against any co-conspirator if it was so proximate, in terms of time and place, as to be within the *res gestae;* if the conspirators were still concerned with the concealment of their criminal conduct or their identity; or if the fruits of the crime had not been disposed of by, or divided among, the conspirators. 3 Wharton's Criminal Evidence (13 Ed.), 338, Section 643.

In addressing the issue of concealment, this court, in *State* v. *DeRighter* (1945), 145 Ohio St. 552, at 558, 62 N. E. 2d 332, summarized the rule as follows:

> " 'The acts and declarations of a conspirator are admissible against the co-conspirator when they are made during the pendency of the wrongful act, and this includes not only the perpetration of the offense, but also its subsequent concealment. The theory for the admission of such evidence is that persons who conspire to commit a crime, and who do commit a crime, are as much concerned, after the crime, with their freedom from apprehension, as they were concerned, before the crime, with its commission; the conspiracy to commit the crime devolves after the commission thereof into a conspiracy to avoid arrest and implication.' " Accord *Dailey* v. *State* (1936), 233 Ala. 384, 171 So. 729; *Hooper* v. *State* (1933), 187 Ark. 88, 58 S. W. 2d 434; *Reed* v. *People* (1965), 156 Colo. 450, 402 P. 2d 68; *Smith* v. *State* (1933), 47 Ga. App. 797, 171 S. E. 578; *State* v. *Borserine* (1959), 184 Kan. 405, 337 P. 2d 697; *Allen* v. *Commonwealth* (1917), 176 Ky. 475, 196 S. W. 160; *People* v. *Mol* (1904), 137 Mich. 692, 100 N. W. 913; *Watson* v. *State* (1933), 166 Miss. 194, 146 So. 122; *State* v. *Strait* (1925), 311 Mo. 604, 279 S. W. 109; *State* v. *Gauthier* (1925), 113 Ore. 297, 231 P. 141.

The court finds the principles of *DeRighter* dispositive of this issue. Approximately an hour after the shooting, an accomplice in the instant case made a statement implicating the defendant while he, the accomplice, was trying to dispose of the murder weapon. Under such conditions such statements are admissible. Moreover, in light of the overwhelming evidence of the defendant's guilt, this court has little trouble finding Carter's testimony of the accomplice's statement reliable and trustworthy.

This proposition of law is not well taken.

Accordingly, for the reasons stated, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

HERBERT, CELEBREZZE, W. BROWN, P. BROWN, SWEENEY and LOCHER, JJ., concur.

APPENDIX "B"

CONSTITUTIONAL AND STATUTORY PROVISIONS

A. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In all criminal prosecutions, the accused shall enjoy the right to . . . the assistance of counsel for his defense.

B. THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

C. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

In pertinent part, the Fourteenth Amendment provides:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CRIMINAL RULE 11

D. RULE 11 PLEAS, RIGHTS UPON PLEA.

(C) Pleas of guilty and no contest in felony cases.

(4) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

E. THE OHIO AGGRAVATED MURDER STATUTES:

§ 2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or

while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2929.02 Penalties for murder

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to

himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

§ 2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.03 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the

charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following

is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense,

or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

PUBLIC DEFENDER STATUTE

F. SECTION 120.16 (WHEN REPRESENTATION TO BE PROVIDED; NOTICE TO ACCUSED.)

(A) (1) The county public defender shall provide legal representation to indigent persons charged with the violation of a state statute that is a serious offense as defined in the Rules of Criminal Procedure, and in postconviction proceedings as hereinafter defined.

. . .

(B) The county public defender shall provide the legal representation authorized by division (A) of this section at every stage of the proceedings following arrest, detention, service of summons, or indictment.

APPENDIX "C"

August 18, 1977

Supreme Court of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43215

Attention: Mr. Thomas L. Startzman, Clerk

Re: State of Ohio vs. Ellis Shelton
Case No. 77-127

Dear Mr. Startzman:

Enclosed please find the following: Notice of Appeal to the Supreme Court of the United States, Application for Appointment of Counsel to Prosecute Appeal, and Affidavit of Indigency, all of which we wish to file in behalf of Mr. Shelton.

We have been in touch with the American Civil Liberties Union regarding arrangements for representation of Mr. Shelton before the United States Supreme Court. We anticipate cooperating with that agency in order to effect representation for Mr. Shelton.

If you require anything else of us, please let us know.

Thank you for your cooperation.

Very truly yours,

WEBER, WORTH & REIF
R. DANIEL REIF

RDR/cm
Enclosures

APPENDIX "D"

August 18, 1977

American Civil Liberties Union
of Ohio Foundation, Inc.
203 East Broad Street
Suite 204
Columbus, Ohio 43215

Attention: Mr. Robert P. App
Legal Director

Re: State of Ohio vs. Ellis Shelton
Case No. 77-127

Dear Mr. App:

Thank you for your letter of August 8, 1977. In accordance with your request, enclosed please find a copy of our brief filed with the Supreme Court of Ohio. In addition, also please find a copy of the Court of Appeals decision herein. We would be happy to make a copy of the transcript available to new counsel in the event you are able to engage new counsel.

I have discussed the case thoroughly with Mr. Weber, and we have no observations independent of those which appear in our brief.

Finally, we have written the Legal Aid office in Cincinnati to inquire as to the availability of counsel. If I can be of further assistance, please do not hesitate to get in touch with me.

In behalf of Mr. Weber and myself, thank you for your cooperation.

Very truly yours,

WEBER, WORTH & REIF
R. DANIEL REIF

RDR/cm

cc: Mr. Thomas L. Startzman, Clerk
Supreme Court of Ohio
Columbus, Ohio 43215

Legal Aid Society of Cincinnati
2400 Reading Road
Cincinnati, Ohio 45202

APPENDIX "E"

September 7, 1977

Mr. Ellis Shelton
#143-199
P. O. Box 45699
Lucasville, Ohio 45699

Dear Mr. Shelton:

Your attorney Dan Reif has been in communication with us concerning withdrawing from your criminal case, and he has requested our assistance in finding other counsel for you. As you probably know, neither the Ohio Supreme Court nor the Supreme Court of the United States appoints counsel for an appeal to the U.S. Supreme Court, but Mr. Alan Brown of Cincinnati, Ohio has agreed to prepare and file a petition for certiorari in the U.S. Supreme Court. As of now that Court has taken one Ohio case for review, *Bell* v. *Ohio*, and is holding all other Ohio cases without granting or denying certiorari. I would anticipate that the same procedure will be followed in your case.

If you decide to have Mr. Brown represent you in your appeal, please contact him directly at 216 East 9th Street, 5th Floor, Cincinnati, Ohio 43202. If you have any questions or if you do not want Mr. Brown's representation, please notify me at once.

Very truly yours,

ROBERT P. APP
Legal Director

RPA:mam:f

cc: R. D. Reif